

CITATION: Arcádia Participações Ltda. v Kondratiev, 2024 ONSC 7132

COURT FILE NO.: CV-08-00354560

MOTION HEARD: 20241205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Arcádia Participações Ltda., plaintiff/ defendant to the counterclaim

AND:

Alexey Kondratiev and Smart Games Canada, Inc., defendants/ plaintiffs by counterclaim

AND:

Eugene Chayevsky, Adenilton Cezar Xavier, Finstar Financial Group LLC and Tilley International & Associates Inc., carrying on business as Tilley Entertainment, defendants to the counterclaim

BEFORE: Associate Justice L. La Horey

COUNSEL: Teodora Obradovic and Emily Lynch (student-at-law), counsel for the plaintiff Arcádia Participações Ltda. and the defendants to the counterclaim Eugene Chayevsky, Finstar Financial Group LLC, Adenilton Cezar Xavier, Tilley International & Associates Inc., carrying on business as Tilley Entertainment, and agent for Greenspan Humphrey Weinstein LLP and Brian Greenspan

Alexey Kondratiev, self-represented and with leave to represent the defendant and plaintiff by counterclaim Smart Games Canada, Inc.

HEARD: December 5, 2024 via videoconference

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff and defendant to the counterclaim Arcádia Participações Ltda. ("Arcádia") and the defendants to the counterclaim, Eugene Chayevsky, Adenilton Cezar Xavier, Finstar Financial Group LLC ("Finstar"), and Tilley International & Associates Inc., carrying on business as Tilley Entertainment ("Tilley"), (collectively with Arcádia, the "Arcádia Parties"), bring this motion to compel the defendant and plaintiff by counterclaim, Alexey Kondratiev to attend at an examination in aid of execution in his personal capacity and on behalf of Smart Games Canada, Inc. ("Smart Games"), a now dissolved corporation

of which Mr. Kondratiev was the sole officer, director, and shareholder and to produce documents. The Arcádia Parties are trying to collect on three outstanding cost orders made in their favour totalling \$236,250 plus interest.

- [2] In response, Mr. Kondratiev and Smart Games (collectively the “Kondratiev Parties”) have brought a motion for an order that:
- a. Fogler Rubinoff LLP, Milton A. Davis, Teodora Obradovic (collectively “Fogler”) and Greenspan Humphrey Weinstein LLP and Brian Greenspan (collectively “Greenspan”) be removed as lawyers of record for the defendants to the counterclaim Arcádia, Finstar and Tilley; and
 - b. The writs of seizure and sale filed with the Regional Municipality of York 23-0001431, 23-0001432, and 23-0001437 be removed and that they be “deemed nullified and void.”
- [3] For the reasons that follow, the Arcádia Parties’ motion is granted and the Kondratiev Parties’ motion is dismissed.

BACKGROUND

- [4] Arcádia commenced this action against Mr. Kondratiev and Smart Games in May 2008. The action relates to ownership of and revenue derived from electronic bingo machines. The dispute arises out of events occurring between 2006 and 2008. The defendants served a statement of defence and counterclaim in June 2008, adding Mr. Chayevsky, Mr. Xavier, Finstar, Tilley and Cadillac Jack Inc. (“Cadillac Jack”) to the litigation as defendants to the counterclaim. Cadillac Jack is separately represented and did not appear on this motion. Mr. Kondratiev and Smart Games issued a statement of claim against the Arcádia Parties and Cadillac Jack in 2009 (Court File No. CV-09-385909). This action and the 2009 action were consolidated in 2014.
- [5] Arcádia was incorporated pursuant to the laws of Brazil. It was dissolved in or about 2015. Finstar, incorporated pursuant to the laws of the State of Illinois, was dissolved in 2013. Tilley, incorporated in Florida, was dissolved in 2015.
- [6] The Kondratiev Parties are liable to pay costs to the Arcádia Parties pursuant to three court orders. First, on September 23, 2021, Associate Justice Josefo dismissed a motion by the Kondratiev Parties to extend the set-down date, dismissed the action and ordered the Kondratiev Parties to pay costs of \$225,000 to the Arcádia Parties (2021 ONSC 6277). Second, Justice Copeland (as she then was) dismissed an appeal of this order on July 22, 2022, and ordered that the Kondratiev Parties pay the Arcádia Parties’ costs of the appeal in the sum of \$10,000 (2022 ONSC 1310). Third, the Court of Appeal for Ontario denied a motion by the Kondratiev Parties for leave to appeal on December 5, 2022, with costs

payable by the Kondratiev Parties to the Arcádia Parties in the sum of \$1,250. These costs have not been paid.¹

- [7] The Arcádia Parties filed writs of seizure and sale against the Kondratiev Parties in respect of the three outstanding cost awards in July 2023. It is these writs of seizure and sale that are being challenged. The Arcádia Parties served a notice of examination in aid of execution on Mr. Kondratiev for October 23, 2023 that attached a list of documents to be produced relating to the assets of the Kondratiev Parties. In particular, the Arcádia Parties seek municipal tax statements and mortgage statements in respect of property of which Mr. Kondratiev is a part owner so that the Sheriff can proceed with the sale of the property pursuant to the writs of seizure and sale filed. Mr. Kondratiev advised that he would not attend the examination stating that: “The examination is an escalatory measure which will only lead to increased costs when the issue can be easily resolved by providing proof of authorization and directions from your clients.” The Arcádia Parties obtained a certificate of non-attendance.
- [8] On December 29, 2023, counsel delivered a signed Direction and Authorization from the Arcádia Parties directing the Kondratiev Parties to satisfy the costs in their favour by delivering funds to Fogler, Rubinoff LLP in Trust. The Direction and Authorization was signed by Pavel Ivlev as authorized representative of each of the five Arcádia Parties.
- [9] In response, Mr. Kondratiev sent an email to counsel on January 5, 2024, stating:
- You have not provided me with the authorizations and directions from your clients. I am unable to accept a document signed by Pavel Ivlev, a convicted money launderer, in good faith.
- Please provide me with the signed authorizations and directions from your clients and the proof of the signatory’s connection to the companies being represented in order to direct the funds.
- [10] Mr. Ivlev acknowledges the conviction in Russia. Although he denies that this is relevant to the litigation, he addresses the issue briefly and deposes in his second affidavit that the charges and conviction were politically motivated and relate to his work as a lawyer in Moscow for clients targeted by the Russian government (Yukos Oil Company and its former Chairman and CEO, Mikhail Khodorovsky). Mr. Ivlev’s evidence is that he was charged by the Russian government when he refused to provide false and incriminating evidence against his clients. Mr. Ivlev then says that he sought political refuge with his family in the United States and was convicted by the Russian government *in absentia*. He attaches to his affidavit a copy of an AP news story concerning international arbitration proceedings whereby Russia was ordered to pay \$50 billion to the former shareholders of Yukos.

¹ The Kondratiev Parties are also liable to pay additional cost amounts to Cadillac Jack pursuant to the orders of Associate Justice Josefo and Justice Copeland.

- [11] I agree with the submission of the Arcádia Parties' that Mr. Ivlev's conviction in Russia is not relevant to the questions I have to decide.

POTENTIAL PRELIMINARY ISSUE

- [12] After my assignment to this long motion, I conducted a number of case conferences. In my case conference endorsement of August 13, 2024, I set a schedule for the motions and directed that rule 34.12 of the *Rules of Civil Procedure* applied to all cross-examinations and that witnesses should answer all questions unless an objection was based on lawyer-client privilege.
- [13] At a subsequent case conference in this matter Mr. Kondratiev took issue with a number of questions refused by counsel for the Arcádia Parties' at the cross-examinations on the basis of lawyer-client privilege. I directed that the refusals could be addressed at the hearing of the motions. Both parties' factums addressed the refusals.
- [14] At the outset of the hearing, I said that I would deal with the outstanding refusals as a preliminary matter. Mr. Kondratiev then advised that he was not making an issue of the refusals at this time. I told Mr. Kondratiev that he would not be able to reopen the issue after I made my decision on the motions. Mr. Kondratiev confirmed that it was not necessary for me to deal with the refusals.

ANALYSIS

- [15] Rule 60 of the *Rules of Civil Procedure* sets out available procedures for executing on a judgment (including a cost order) that the debtor does not pay. A creditor may cause writs of seizure and sale to be issued under rule 60.07. Pursuant to rule 60.18(2) the judgment creditor may examine a judgment debtor in aid of execution. The person examined is required to produce documents relevant to the examination listed in the notice of examination. Where a debtor fails to attend, the court can make an order compelling attendance and production of documents. The Arcádia Parties' motion seeks relief commonly sought in enforcement cases.
- [16] In response to the Arcádia Parties' enforcement efforts, the Kondratiev Parties seek to remove Fogler and Greenspan as lawyers of record for three of the five defendants, *i.e.*, the three dissolved companies. In his notice of motion, Mr. Kondratiev states that Fogler and Greenspan have failed to provide proof that Arcádia, Finstar and Tilley have any corporate agents capable of giving instructions and that they could not have retained Fogler and Greenspan as lawyers in October 2022 (when they took over from Norton Rose Fulbright Canada LLP) due to their dissolved status.
- [17] In his factum filed on this motion on his own behalf and on behalf of Smart Car (a dissolved corporation as of April 2024), Mr. Kondratiev makes the following submission:
34. Kondratiev asserts that the dissolved corporations Arcádia, Finstar, and Tilley are not legal entities. These three corporations cannot receive payments, have legal representation, or bring forward motions after the dismissal of the action.

[18] Later in the same factum, Mr. Kondratiev submits at paragraph 38:

38. While Kondratiev does not dispute the fact that a dissolved corporation can defend itself, Kondratiev disputes that Ivlev had the capacity to provide instructions on behalf of the dissolved corporations.

[19] He also submits that Mr. Ivlev has failed to demonstrate that he acted in the capacity of a director or was appointed by the board of directors to provide instructions on behalf of the dissolved corporations before they were dissolved.

[20] In oral argument Mr. Kondratiev said that a dissolved corporation can defend itself but cannot retain counsel after dissolution, cannot receive money, have a bank account or have a trust account. According to Mr. Kondratiev, the dissolved corporation cannot bring a motion unless it is defending itself.

[21] Mr. Kondratiev also alleged that the three corporations made strategic choices to dissolve in order to conceal evidence. There is no evidence before me that this is the case. Indeed, the corporations participated in the discovery process and produced affidavits of documents after they were dissolved.

[22] Pursuant to subsection 242(1) of the *Business Corporations Act*² (“OBCA”) a corporation dissolved under the OBCA has the right to defend an action and to assert a counterclaim.³ However, the difficulty here is that none of the three dissolved corporations are Ontario corporations and there is no evidence before me about the laws of the jurisdictions in which the three dissolved companies were incorporated. Ms. Obradovic submits that it was incumbent on the Kondratiev Parties to lead this evidence. Ms. Obradovic also submits that by analogy Arcádia, Finstar and Tilley have the same rights that Ontario corporations would have to defend themselves, to assert rights (including for the collection of costs), and to engage counsel, through an agent, or otherwise. However, she could not point to any case law for this proposition.

[23] Based on the record before me, I cannot come to any conclusions on the rights of foreign dissolved corporations. Corporations are creatures of statute, and I would be hesitant to apply Ontario case law derived from the provisions of an Ontario corporate statute.⁴ It may be that the corporate statutes of Brazil, Illinois and Florida have provisions regarding the status of dissolved corporations and litigation. However, the issue does not squarely arise here because I can decide this motion without opining on the ability of the dissolved corporations to collect costs.

² R.S.O. 1990, c. B.16

³ *Tomken v Kamato (V) Ltd. v 752458 Ontario Ltd.* at para 21. See also *Sickinger v Krek*, 2016 ONCA 459.

⁴ There is authority to the effect that where foreign law is not proved, the law of the forum is the only available law to be applied, see Janet Walker, *Canadian Conflict of Laws*, 7th ed (Toronto: LexisNexis, loose-leaf updated December 2024, Issue 110) at § 16.01(4). However, neither party referred to this authority and it is not necessary for me to invite submissions on it as I can decide the motion without regard to the legal capacities of foreign dissolved corporations.

- [24] Based on his oral submissions, it appears that Mr. Kondratiev’s chief objection is not on what the dissolved companies can and cannot do, but rather his belief that the retention of Fogler and Greenspan was not properly authorized and the directions signed by Mr. Ivlev are not valid because Mr. Ivlev is “an imposter”.
- [25] Mr. Kondratiev does not believe that Mr. Ivlev is a properly authorized representative of the three dissolved corporations because he has not provided “hard evidence” that he was authorized by those parties and the only evidence is the “words of the parties to the litigation”. Mr. Kondratiev points to the fact that Mr. Ivlev in cross-examinations could not remember the exact dates when he was authorized. He does not accept that the evidence in the affidavits of Mr. Ivlev, Mr. Xavier and Mr. Chayevsky and the evidence on their cross-examinations is sufficient. Although I have reviewed the affidavits filed on this motion and read the cross-examination transcripts as well as the factums, I will comment only on some of the evidence below.
- [26] Mr. Ivlev filed two affidavits on this motion and was cross-examined. His evidence is that he has acted as the authorized agent for each of Arcádia, Finstar and Tilley, as well as the individual defendants in connection with this litigation.
- [27] Mr. Xavier, a defendant to the counterclaim filed an affidavit and was cross-examined. He was the managing director of Arcádia at the time that it commenced the lawsuit. His evidence is that he agreed to have Mr. Ivlev represent Arcádia and himself in the litigation to the present.
- [28] Mr. Chayevsky, a defendant to the counterclaim filed an affidavit and was cross-examined. His evidence is that he was the former managing partner of Finstar and that Mr. Ivlev has represented his interests and Finstar’s interests since the litigation began to the present day. Mr. Ivlev was hired as an advisor and would hire law firms in Canada to handle the litigation. He agrees that Mr. Ivlev is authorized by the Arcádia Parties to direct this litigation, including enforcement.
- [29] Regarding Arcádia, Mr. Kondratiev takes issue with the evidence of Mr. Xavier, because Mr. Xavier stopped working for Arcádia in 2008. Mr. Kondratiev also relies on Mr. Ivlev’s acknowledgment on cross-examination that he did not know an individual identified as the current legal representative for Arcádia in a 2011 document.
- [30] With respect to Finstar, Mr. Kondratiev points to the fact that Mr. Chayevsky was not employed by Finstar at the time of its dissolution and when the costs were granted. Mr. Kondratiev also submits that Mr. Ivlev provided no evidence that he had been authorized by the individual listed as the last manager for Finstar with the State of Illinois before its dissolution in 2013.
- [31] Concerning Tilley, Mr. Kondratiev notes that Mr. Ivlev could not recall who authorized him to act on behalf of Tilley and that he did not swear an affidavit of documents on behalf of Tilley.

- [32] Mr. Ivlev's representation of the Arcádia Parties has been previously addressed by the court. On October 3, 2019, Master Brott (as her title then was) made an order that the defendants to the counterclaim (except Cadillac Jack) be represented at mediation by one representative (as well as counsel) who would have instructions from all the defendants to the counterclaim to enter into a binding settlement agreement. The mediation was held on October 25, 2019. It was not successful.
- [33] On December 16, 2019, Master Muir released a decision on a motion brought by the Kondratiev Parties for various relief (2019 ONSC 7303) in which he refused to sanction the Arcádia Parties for an alleged breach of Master Brott's order concerning the mediation. He found no breach of Master Brott's order. At paragraph 10 he said in part:
- Mr. Pavel Ivlev attended the mediation with counsel for those defendants by counterclaim. The evidence of those defendants by counterclaim is that Mr. Ivlev was present at the mediation as their representative in accordance with the terms of Master Brott's order. There is nothing in the evidence to suggest otherwise.
- [34] At the same time, Master Muir refused to strike out Finstar's defence on the basis that it had not served a proper sworn affidavit of documents. Finstar's affidavit was sworn by Mr. Ivlev who deposed that he was a consultant to Wolff Investments Limited, the person responsible for winding up the business of Finstar. Master Muir accepted that Mr. Ivlev, as the person responsible for the winding-down of Finstar's operations was a proper person to swear the affidavit of documents.
- [35] Although a full corporate history for all three dissolved companies and a list of all of their authorized representatives has not been provided, after reviewing the evidence, and having regard to the prior orders of the court, I find that Mr. Ivlev has the authority to represent the dissolved corporations, subject to the provisions of their incorporating statutes. However, as noted above, I have not been provided with foreign law and I do not need to decide whether Mr. Ivlev can represent the dissolved corporations pursuant to foreign law.
- [36] Three courts have made orders that the Kondratiev Parties pay costs to five parties: Arcádia Participações Ltda., Eugene Chayevsky, Finstar Financial Group LLC, Adenilton Cezar Xavier, and Tilley International & Associates Inc., carrying on business as Tilley Entertainment. Each of the three court orders requires payment to the Arcádia Parties as a group. These five parties have been represented throughout by the same law firms – first Norton Rose, then Fogler and Greenspan.
- [37] Whatever the status of the dissolved corporations and their ability to recover on the cost orders, there is no issue that two of the five Arcádia Parties are individuals who have provided affidavits on this motion in which they say that they wish to pursue the costs orders and that Mr. Ivlev is authorized to represent them. In my view, Mr. Kondratiev cannot by taking issue with the three dissolved corporations, avoid the cost orders which are also payable to two individuals. Assuming the cost orders are paid to Fogler in Trust, it will be up to Fogler to deal with the any capacity issues of the dissolved corporations if necessary.

- [38] I have come to the conclusion that the position of the Kondratiev Parties is a transparent attempt to evade having to pay the three costs orders. At the outset of the hearing I explained to Mr. Kondratiev that there was a process whereby he could pay the amount of the costs orders into court if he was concerned about the ability of the dissolved corporations to instruct counsel and receive costs. If the monies were paid into court, Mr. Kondratiev could be protected if a third party later established that Mr. Ivlev was not properly authorized. Mr. Kondratiev advised he was not prepared to pay the cost awards into court.
- [39] Associate Justice Josefo required the payment of a \$9,000 cost order owing by the Kondratiev Parties to the Arcádia Parties before he would schedule the Kondratiev Parties' motion to extend the set down date. There was an issue about receipt of payment. In that context, Mr. Kondratiev wrote to an assistant trial co-ordinator on January 11, 2021, asking him to advise Associate Justice Josefo that three of Norton Rose's clients were dissolved and that "Due to their status, the dissolved corporations would be unable to explicitly confirm or deny such receipt of costs." In response, Associate Justice Josefo said that Mr. Kondratiev could provide proof that a cheque was cashed by Arcádia or he could stop payment on that cheque and deliver funds to Norton Rose in Trust. Mr. Kondratiev paid the cost order in the sum of \$9,000 to Norton Rose in Trust in January 2021.
- [40] Mr. Kondratiev was aware that Arcádia, Finstar and Tilley were dissolved when the Kondratiev Parties brought the motion to extend the set down date before Associate Justice Josefo. According to his affidavit filed on that motion sworn February 25, 2021, Mr. Kondratiev became aware in February 2018 that Arcádia was dissolved and was aware from receipt of the reply and defence to counterclaim dated March 22, 2016, that Finstar and Tilley were alleged to be dissolved corporations. Notwithstanding this knowledge, the Kondratiev Parties sought to pursue their counterclaim against all of the defendants to the counterclaim including the three dissolved corporations. Nor did they bring a removal motion against counsel acting for all of the Arcádia Parties at that time (Norton Rose).
- [41] When the Kondratiev Parties appealed the order of Associate Justice Josefo to the Divisional Court, they did not also seek leave to appeal from the cost order in their notice of appeal. No motion for removal of counsel for the three dissolved corporations was brought.
- [42] The Kondratiev Parties' challenge to the writs of seizure and sale is a collateral attack on the three cost orders. I see no basis to set aside the writs of seizure and sale based on those orders.
- [43] It was only after the Arcádia Parties brought this enforcement motion that the Kondratiev Parties sought removal of counsel for the three dissolved corporations. They did not provide any evidence (in the form of foreign law) that the dissolved corporations are unable to retain counsel under the laws of the jurisdiction of those corporations. The removal request is brought well after the Kondratiev Parties became aware that the corporations were dissolved.

DISPOSITION AND COSTS

- [44] Therefore, the Arcádia Parties' motion for an order compelling Mr. Kondratiev to attend an examination in aid of execution and to provide documents in advance of the examination (including the municipal tax statements in respect of Mr. Kondratiev's property and mortgage statements for the charge registered on the property) is granted. I also award the Arcádia Parties the costs thrown away in respect of the scheduled examination in aid of execution that Mr. Kondratiev failed to attend in the sum of \$1,585 (all-inclusive). Mr. Kondratiev did not take issue with this quantum requested.
- [45] Mr. Kondratiev's motion to remove counsel is dismissed as is his motion to vacate (expunge) the writs of seizure and sale.
- [46] The Arcádia Parties uploaded a cost outline prior to the hearing. Mr. Kondratiev did not upload any cost materials. At the conclusion of the hearing I heard argument on costs to be awarded if the Arcádia Parties were successful. If Mr. Kondratiev was successful, I said that costs would be dealt with at a later stage, given the added complexity that he is a self-represented litigant.
- [47] As the Arcádia Parties are the successful parties, they are entitled to their partial indemnity costs of the motion. They submitted a bill of costs seeking partial indemnity costs in the sum of \$21,982.00 (all-inclusive). Mr. Kondratiev says that this amount is excessive, and points to the \$9,000 cost award of Master Muir as a benchmark.⁵ I note that Master Muir reduced the amount of cost claimed by the Arcádia Parties in fixing costs of \$9,000 because they were not successful on all issues. The Arcádia Parties were completely successful on this motion. Furthermore, in the motion before Master Muir there were no cross-examinations. On this motion four individuals were cross-examined. In addition, the Arcádia Parties prepared written and oral argument on the refusals issues which were abandoned by Mr. Kondratiev at the hearing.
- [48] Having regard to the factors in rule 57 and the circumstances of this case, I am satisfied that the sum of \$20,000 (all-inclusive) on a partial indemnity basis is a fair and reasonable amount and within the reasonable expectations of the parties. Accordingly, the Kondratiev Parties shall pay costs of this motion to the Arcádia Parties in sum of \$20,000 within 30 days.
- [49] I have signed an order.

L. La Horey, A.J.

Date: December 18, 2024

⁵ 2020 ONSC 1205